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December 8, 2003

Re: State/ AR-01/ 96
Comments on Proposed Rules for Hague Convention on Intercountry Adoption

To: **U.S. Department of State**
CA/ OCS/ PRI
Adoption Regulations Docket Room
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Electronically mailed to adoptionregs@state.gov

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Comments that follow pertain to 22 CFR Part 96, Subpart C through Subpart F

Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records; Proposed Rules

General comments, unique perspective and relevant experience of International Concerns for Children (to be followed by specific comments and suggested rewording)

For the past 28 years, International Concerns for Children has published the annual Report on Intercountry Adoption as part of its advocacy for children in need of homes overseas. Originally incorporated as the International Committee of Concern for Children by a group of adoptive families, this nonprofit has shortened its name but has expanded its mission of educating fellow adoptive parents about intercountry adoption programs and the agencies that operate them. Our unique perspective arises from our long-term close association with both agencies and adoptive families, which leads us to conclude that the vast majority of placing agencies are run by dedicated, responsible, and ethical individuals who (like all of us) are sometimes subject to human error in negotiating the minefield of intercountry adoption with its many unknowns. The annual Report on Intercountry Adoption has been produced with the benefit of feedback from adoptive families-- as well as objective documentation such as fees, licenses and federal determination letters -- to establish which agencies (and which of their overseas programs) qualify for inclusion in its directory as ethical and legitimate providers of adoption services.

It distresses us greatly that adoption agencies are, as a group, being demonized by disappointed adoptive parents, as a result of the serious errors or offenses of a relatively small number. This is a tremendous injustice, already being played out in the courts to everyone's detriment, despite the fact that the vast majority of agencies are reputable, dedicated nonprofits which can ill afford lawsuits or the loss of insurance. In our litigious society, agencies are feeling desperate about their problems with insurance, at the same time that anti-agency sentiment is becoming organized and promoted by a small percentage of angry adoptive parents and their advocates who seem to have influenced their congressional representatives to favor dangerous regulations regarding insurance, risk and liability. These well-intentioned but dangerous provisions – which threaten the very existence of all agencies working overseas –are, ironically, being promoted as measures which will help **"the client". However, we respectfully submit that, if they are retained in the regulations, they are almost certain to destroy the many agencies whose employees are selflessly dedicating their lives to helping adoptive parents and the children they hope to adopt.**

We appreciate so much the opportunity to submit comments. **ICC would like to go on record as supporting the proposed second release of the regulations with an additional comment period.**

Specific comments and suggested rewording of problematic sections of proposed rules, Subpart C and Subpart F

(Proposed additions are underlined, and proposed deletions are in brackets)

Comments on 96.13 (a)

Home study providers generally will become supervised providers, once their clients select a placing agency, since their responsibilities will then include anticipated post-placement services. It is very important, logistically, that they be exempt to begin with, since clients usually take some time, during the home study, to thoughtfully select a suitable placing agency. ICC favors the following wording changes that Joint Council also favors, which is wording that we originally proposed to JCICS. This changed wording clarifies the sequence of events and allows the currently exempt local service agency to later provide the customary post-placement services.

The suggested change in the fourth sentence below, from "approval" to "re-approval", allows for the customary first approval by the home study agency and/or child study agency which is expected by federal and/or state authorities (for example, CIS, as well as the receiving state's Interstate Compact Administrator in cases where ICPC is applicable to international placements.)

The DOS may possibly wish to bifurcate these proposed rules to allow home study providers and child background study providers to be dealt with separately, but the logistical issue (and the sequence of events) may be the same or similar for both in any given case. The regulations' later references to "approval" in this context can be changed to mirror the change in the fourth sentence.
Suggested rewording of 96.13(a)

(a) A social worker professional or organization that is performing a home study...but is not <u>currently</u> providing any other adoption service in the case is an "exempted provider"...

(a) (third sentence): [If] Once the agency or person provides another adoption service in the case in addition to the home study ...

(a) (fourth sentence) The home study or child background study prepared by an exempted provider must be submitted to an accredited agency or temporarily accredited agency ... for review and re-approval.

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Comments on 96.33 (h)

We believe that one of the greatest threats to agencies in the regulations is the strict requirement in this subsection for $1,000,000 per occurrence in professional liability insurance, at a time when many agencies are having increasing difficulties with obtaining ANY coverage and also are being told – in 96.39(d)-- that they can't ask clients to sign a "blanket waiver of liability." We know that DOS does not intend for good agencies to have to close their doors because of lawsuits (or the danger thereof) and resulting uninsurability, so we ask that you PLEASE make it possible in some way for all providers to get the required insurance -- and to clarify in the final regulations how this will happen. WE ARE THINKING OF SOMETHING LIKE A HAGUE INSURANCE COMMISSION that the Central Authority would set up at reasonable cost to providers in good standing, whether they were accredited, approved, or supervised providers. In addition, we hope that the DOS will help enable insurance companies to offer adoptive parents insurance for their adoptions, to cut down on the very present danger of unjustified wrongful adoption suits if something goes terribly wrong (as it sometimes does in any aspect of life, through no one's fault.)

Because agencies and persons would be very unlikely to be able obtain coverage at all if they were expected to cover supervised providers, and because specifying any specific dollar amount as a floor of insurance (even $200,000) would encourage lawsuits of that amount or greater, we suggest the following change in the proposed regulation. (In addition to the requested deletion of the latter section, we suggest adding the underlined "good faith" modification to acknowledge the reality that good agencies with excellent records are already losing insurance through no fault of their own and may be making a vigorous, sustained effort, for some time, to replace it.)

Suggested rewording of 96.33(h)

(h)The agency or person makes good faith efforts to continuously maintain[s] insurance in amounts reasonably related to its exposure to risk [including the risks of providing services through supervised providers, but in no case less than $1,000,000 per occurrence]

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Comments on 96.37 (d) through (g):

We feel very positive about the rule in (d) that supervisors, non-supervisory employees, and those who conduct home studies are allowed to have professional degrees in social work "or a related human services field". This is very good, as many agencies' most experienced adoption

professionals are not social workers. We very much hope that the final regulations retain this flexibility.

On the other hand. 96.37 (f) and (g), have upset many agencies who traditionally have used people with a bachelor's degree in human services (and extensive experience in intercountry adoption) to conduct home studies and to prepare child background studies. Why must these experienced, qualified people be required to have a master's degree when those described in (e) directly above (non-supervisors who apply "other clinical skills and judgment") may have a bachelor's degree in any field as long as they have experience? Since all these experienced adoption workers are supervised and may simply have different functions (rather than the different skills and judgment that the DOS description suggests), they should ALL receive the benefit of equal treatment, in our opinion, so that none of them have to lose their jobs – sometimes in a geographical area where those with a master's degree may be hard to find. We respectfully submit that it is not sufficient that current bachelor's degree holders should be grandfathered, although this is a beginning. We would like to see bachelor's degree holders considered on their merits, not the least of which is life experience. In addition, to make up for any perceived deficit in their education, present and future employees with a bachelor's degree could be required to obtain the number of continuing education hours that their state requires for master's degree holders. Otherwise there could be severe staffing shortages.

Suggested rewording of 96.37(f)(1) -- and (g), which has corresponding language:

...have a minimum of a [master's] <u>bachelor's</u> degree from an accredited program of social work education or a [master's] <u>bachelor's degree (or higher degree)</u> in a related human service field, including, but not limited to...

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Comment on 96. 38(b)(9)

All those with a professional degree have had courses in child, adolescent and adult development as part of their formal education, but not necessarily as it relates specifically to adoption. We suggest the following addition to make clear that it is adoption-related development that needs to be addressed in the agency's initial employee training. Anything more is too broad to cover adequately along with the eight other subjects proposed for initial training

Suggested rewording of 96.38(b)(9)

(9) Child, adolescent and adult development <u>of the adopted person</u> (or, as an alternative, <u>as it is affected by adoption.)</u>

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Comments on 96.38 (c) The proposed 20 hours of conferences, seminars, and other programs annually is a problem because it may exceed state requirements even for those with a master's degree in human services. (In Massachusetts, for example, those mental health counselors and social workers who are licensed at the highest level are only asked to document 30 hours every two years.) Many small agencies depend heavily on independent practitioners such as these to do home

studies and post-placement services on a per-case, as-needed basis. They might lose these highly qualified contract workers with private practices if the number of Continuing Education hours is perceived as excessive, and small agencies might be unable, because of small caseloads, to hire more regular employees (who would, unlike the contract workers, have to comply or lose their regular employment.). Also, documented distance learning should be an acceptable alternative.

Suggested rewording of 96.38 (c)

The agency or person ensures that employees who provide adoption related services that involve the application of clinical skills and judgment ... also receive ... no less than 30 hours of training over a 2-year period [20 hours of training each year] ... through participation in seminars, conferences, documented distance learning courses, and similar programs.

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Comments on 96.39(d)

We are very worried about the prohibiting of a "blanket waiver" (which is not defined and could possibly be interpreted to exclude a waiver of specific known risks, about which clients are routinely educated by their agencies.) Our suggested rewording below, arrived at in collaboration with Joint Council, would be a very helpful proactive approach, telling agencies what the CAN do to protect their clients and themselves at the same time. Moreover, it seems right and fair to educate the client and about, and ask the client to assume, risks of intercountry adoption that are beyond the control of agencies. All parenthood carries innumerable risks, and parents who give birth recognize this when they say about an expected baby, "We just hope it is healthy." They do not ordinarily sue the obstetrician if the child has medical, neurological or developmental problems that were not predicted (or predictable) before birth.. However, infertile adoptive parents may lose this perspective and become litigious toward agencies because of years of disappointment and anger. We respectfully suggest that **agencies need DOS to help them protect them from such clients and their attorneys, rather than helping clients and attorneys to make it easier to sue agencies. (e.g. DOS might allow agencies to ask clients to agree to binding arbitration, with a cap.)**

Suggested rewording of 96.39(d):

> **96.39(d) The agency or person [does not] may require a client or prospective client to sign a [blanket] waiver of liability in connection with the provision of adoption services in Convention cases, provided that it specifies, in clear language, various risks of intercountry adoption and asks the client to voluntarily assume these risks as a condition of receiving services.**

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Comments on 96.45(b)(8) and (c) as well as 96.46 (c)

We strongly urge you to either delete these three subsections, or to delete 96.45(b) and reword both 96.45(c) and the corresponding 96.46(c), for the following reasons. (Our proposed rewording of the latter two follows our comments, if you choose to reword rather than delete them.)

1) Placing agencies already have huge problems getting and maintaining insurance, and at least one broker has said that insurance companies would never insure an agency that was legally responsible for foreign providers of adoption services. Covering US based supervised providers (local service agencies and social workers) would probably not be any easier. One agency director said, "Our liability insurance will not cover individuals who are not employees of the agency".

2) Coverage even for U.S. based supervised providers (even if it were possible) would make insurance so costly that primary providers would avoid using "local service agencies" to provide home studies, parent preparation and post-placement, choosing to use only other accredited agencies. This would almost certainly force the many small agencies that do local service to close their doors and would result in the loss of the thousands of adoptive homes that these agencies, collectively, provide placing agencies with each year.

These local service agencies, ironically, are the ones that can still easily get affordable insurance of their own (since they don't place children and are almost never sued). This will no longer be true if they are allowed --as in 96.45(d) --to be sued by any accredited agency with legal responsibility for their actions-- as one agency director stated clearly that she would do. They therefore should be specifically exempted from the need to have "tort, contract, and other civil liability to the prospective parents" assumed for them by the accredited agency as provided in 96.45(c)(1). Also, **the regulations of 96.45(c)(2) and 96.46(c)(2) -- requiring all supervised providers' inclusion in a bond, escrow amount, or liability insurance which is maintained by the accredited agency – should at least be changed to specifically exclude licensed agencies who are not involved in any way with the locating or placing of children. Even better, it should be deleted, since the enormous cost would have to be passed on to clients, resulting in fewer adoptive homes for children.**

3) No provisions have been made in the rules for anything like an insurance commission that would guarantee liability coverage to both accredited agencies and supervised providers in good standing. It would be wonderful if the government could create something like this, since some agencies are repeatedly turned down for coverage even now, before the risks increase.

4) As others have pointed out, the rules offer excellent standards and complaint procedure, with disciplinary actions to punish violations and put bad agencies out of business. So why shouldn't this in itself be enough to make agencies "do a better job" of overseeing supervised providers? (This was the stated intent of the DOS in placing legal responsibility with accredited agencies.) If compensation of wronged clients is also a goal, all agencies could contribute a few hundred dollars each year to a fund for client protection administered by DOS as the Central Authority.

5) In essence, these proposed rules pit agencies against other agencies and against clients, and could destroy the mutual trust we seek to build, and would endanger individual agencies and intercountry adoption as a whole
We present alternative language below, which emphasizes clients' **responsibility for the choices they make** (1) as to whether to adopt despite acknowledged risks (2) whether to use a home study/post placement provider **of their own selection, which is a separate entity from the primary provider, and with which they will have a separate contract**. The suggested rewording of 96.45(2)(d) addresses the problem that primary and supervised agencies will have if they are

legally pitted against each other and lose their insurance as a result. We cannot emphasize too strongly that it is the clients that choose each of their agencies, often without advice from either agency, and that it is only the decision of the client that brings a local service agency together with a placing agency. There is no inherent connection between the two agencies. Moreover, either agency could have liability problems if it refused to work with the client's choice of networking agency in any case where there is a favorable home study and each is a licensed agency in good standing.

96.45(b)(8) [Suggest deletion of this proposed rule to render it consistent with the reworded or deleted rule 95.45(c) below, whether you choose to reword or delete]

Suggested rewording of 96.45(c) and 96.46(c), if they are to be reworded and not deleted:

96.45(c) The agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services [does the following in relation to risk management]

(c)(1)[Assumes] Shall not be deemed to have assumed tort, contract and other civil liability to the prospective adoptive parent(s) or adoptive parent(s) for the supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F; and

(c)(2)[Maintains] Need not maintain a bond, escrow account or liability insurance sufficient to cover the risks of liability arising from its work with supervised providers, so long as it has a waiver of liability, signed by clients or prospective clients, that clarifies that the supervised provider is a separate entity which the client has chosen to contract with separately for certain services.

(c)(2)(d) [Suggest deleting all of the present (c)(2)(d)] and adding the following in its place:

(c)(2)(d) In view of the difficulties many agencies have had in the past with obtaining insurance even for their own corporation, staff and board, primary providers and supervised providers-- who are typically brought together in the first instance by a voluntary choice of prospective adoptive parents more than by their own decision -- may mutually agree not to pursue any legal claims against each other in connection with their respective provision of adoption services.

96.46 (b)(9) and (c)(1) and (c)(2) Suggest changes that correspond to the parallel changes in 96.45

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Comments on 96.48 (d):

ICC supports the wide variety of parent training options (in-person and distance learning) that the regulations offer. We have great enthusiasm for outstanding standardized online courses such as those created by Adoption Learning Partners, which already help small rural agencies and geographically scattered clients immensely. Also, if at least a part of training included such standardized courses, it would help defend agencies against the allegation that they did not prepare families thoroughly enough for the intercountry adoption experience. **Please retain the wording**.

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Comments on 96.49 (e)(1) through (5):

Most of 96.49 is reasonable in specifying what medical and social reports and observation reports on children must include, especially since much of it allows for "reasonable efforts". However, we fear that too much pressure for missing or unavailable details can make already overburdened foreign orphanages, foreign agency representatives, and overseas doctors feel harassed and criticized, to the point where they may refuse to work with us. Section (e), we believe, asks more than can be reasonably expected in many cases from a developing country, putting everyone in a bind. We suggest the same wording here about **making "reasonable efforts"** to obtain this information as is used in section (d) and also in section (f) that follows immediately (which refer to obtaining medical and social information respectively) and cut the overseas child care providers and doctors some much needed slack. We believe the omission in (e) was probably unintentional.

Suggested rewording of 96.49 (e)

(e) If the agency or person provides medical information to the prospective adoptive parents from an examination by a physician or from an observation of the child by someone who is not a physician, [the information includes] <u>the agency or person makes reasonable efforts to obtain and include:</u>

(1) through (5) currently follow here, but we respectfully suggest deleting the latter part of (3) (after the words "the identity of the individual") [delete whatever follows] as it would be offensive to foreign child care providers that make observations on children to imply that they need training , which nearly all of them would not have not had access to, to make such observations. Also, can we not assume that all individuals, including physicians, universally make observations that are subjective to some degree? To claim that any observation is objective increases the liability of an agency and the reporting individual.

End of ICC's comments. Thank you very much for considering our suggested rewording. We look forward to the hoped-for second release of proposed regulations.